MOTION FILED
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(3)

No. 84-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KN ENERGY, INC.,
Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

ASSOCIATE MEMBERS

Amoco Production Company
ARCO Oil and Gas Company
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Champlin Petroleum Company
Chevron USA
Cities Service Oil and Gas Corporation
Conoco Inc.
Entex, Incorporated
Exxon Company, U.S.A.
Forest Oil Corporation
Gulf Oil Exploration and Production Co.
John H. Hill
HNG Fossil Fuels Company
HNG Oil Company
Kerr-McGee Corporation
Kinsey Interests, Inc.
Laclede Gas Company
Lear Petroleum Exploration Company
Marathon Oil Company
Minerals, Inc.
Mitchell Energy & Development Corp.
National Fuel Gas Company
NUI Corporation
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Sun Exploration & Production Company
Texaco U.S.A.
Union Oil Co. of California

1985

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

ACTIVE MEMBERSHIP

Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
ANR Pipeline Company
Arkla, Inc.
Colorado Interstate Gas Company
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
El Paso Natural Gas Company
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
Houston Natural Gas Company
Kentucky West Virginia Gas
KN Energy, Inc.
Locust Ridge Gas Company
Michigan Gas Storage Company
MidCon Corporation
Mid Louisiana Gas Company
Northern Natural Gas Company
Northwest Energy Company
Pacific Gas Transmission Company
Pacific Interstate Transmission Co.
Panhandle Eastern Corporation
Ringwood Gathering Company
Southern Natural Gas Company
Tennessee Gas Transmission Company
Texas Eastern Transmission Corp.
Texas Gas Transmission Corporation
Texas Oil & Gas Corporation
Transcontinental Gas Pipe Line Corporation
United Gas Pipe Line Company
Valero Interstate Transmission Co.
Valley Gas Transmission, Inc.

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THE GREAT WESTERN SUGAR CO.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Interstate Natural Gas Association of America (INGAA)[1] hereby moves for leave to file the accompanying brief *amicus curiae*. This Motion is necessary because counsel for one party to this proceeding, the Great Western Sugar Company (Great Western), has refused to consent to the filing of such brief. Significantly, neither Great Western nor any other party objected to INGAA's motion for leave to intervene and file a brief *amicus curiae* in

[1] INGAA's member companies are listed on the inside cover and the cover's facing page of this motion and brief.

the proceedings below.[2] All other parties to this proceeding have consented to INGAA filing an *amicus* brief herein, as evidenced by the letters of consent filed with the Clerk in this docket.

INTEREST OF *AMICUS CURIAE*

INGAA is the nonprofit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission) under the Natural Gas Act of 1938 (15 U.S.C. Section 717, *et seq.*), the Department of Energy Organization Act (42 U.S.C. Section 7101, *et seq.*) and the Natural Gas Policy Act (15 U.S.C. Section 3301, *et seq.*).

The service obligations of INGAA's member companies, including KN, are specifically regulated by the Commission pursuant to Section 7 of the Natural Gas Act (15 U.S.C. Section 717(f)). The regulatory authority of the Commission in this regard is pervasive and provides the Commission with primary and exclusive jurisdiction over interruptions of service. Based on this exclusive and pervasive jurisdiction, the Colorado courts erred in not referring questions relating to interruptions of service to the Commission before reaching a decision on the question of compliance with state contract law. This error is of important legal significance because it is contrary to prior holdings of this Court and other courts. It is also of broad practical significance because it (a) undermines uniform regulation of the interstate transportation of natural gas mandated by Congress in the NGA, (b) brings into doubt the policies and programs of the Commission, which, during the supply shortages of the 1970's, were implemented on a broad basis

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[2] See order of the Supreme Court of Colorado, dated September 20, 1982 [Appendix to this Motion].

by numerous interstate natural gas pipelines, and (c) puts such pipelines at risk in this and other pending proceedings for curtailments or service interruptions performed in accordance with Commission certificates, tariffs, orders, and regulations.[3]

For all of the above reasons, the interests of the interstate natural gas transmission industry in this proceeding are relevant to the disposition of the Petition for a Writ of Certiorari by this Court. These interests cannot adequately be represented by any party other than INGAA.

WHEREFORE, INGAA respectfully requests this Court to grant it leave to file a Brief *Amicus Curiae* in support of Petitioner.

Respectfully submitted,

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June 4, 1985

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[3] See *e.g.*, *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, C.A. No. J74-185(N) (S.D. Miss. April 22, 1977); *Mississippi Power Co.* v. *United Gas Pipe Line Co.*, C.A. No. S74-285(C) (S.D. Miss. June 14, 1977); *Allied Paper Co.* v. *United Gas Pipe Line Co.*, C.A. No. 75-431(H) (S.D. Ala. Jan. 19, 1977); *Texasgulf Inc.* v. *United Gas Pipe Line Co.*, 471 F.Supp. 594 (D.D.C. 1979); *Texasgulf Inc.* v. *United Gas Pipe Line Co.*, C.A. No. 2253-71 (D.D.C. Oct. 26, 1984).

APPENDIX TO MOTION

SUPREME COURT, STATE OF COLORADO

Case No. 82 SC 322

CERTIORARI TO THE COLORADO COURT OF APPEALS

ORDER OF COURT

KANSAS-NEBRASKA NATURAL GAS CO., INC., a Kansas corporation, *Petitioner,*

vs.

THE GREAT WESTERN SUGAR COMPANY, a Delaware corporation, *Respondent,*

and

NORTHERN NATURAL GAS CO., a Delaware corporation, *Defendant.*

Upon consideration of Motion for Special Admission as an Out of State Attorney filed by John H. Cheatham, III and the Motion of the Interstate Natural Gas Association of America for Leave to appear as Amicus Curiae in the above cause filed by John H. Cheatham, III herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Motions shall be, and the same hereby are, Granted, and the Interstate Natural Gas Association of America shall be permitted to file a Brief as Amicus Curiae.

BY THE COURT, SEPTEMBER 20, 1982

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[Supreme Court State of Colorado Certified to be a full, true and correct copy Sep 21 1982 David W. Brezina Court Seal By /s/ K. Eldredge Deputy Clerk]

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This *amicus curiae* brief is respectfully submitted by the Interstate Natural Gas Association of America (INGAA) in support of the Petition for Writ of Certiorari of KN Energy, Inc. (KN).

INTEREST OF *AMICUS CURIAE*

INGAA is a nonprofit national trade association whose membership includes virtually all of the major interstate natural gas transmission companies subject to the jurisdiction and regulation of the Federal Energy Regulatory

Commission, the successor to the Federal Power Commission[1] under the provisions, *inter alia,* of the Natural Gas Act of 1938, as amended. 15 U.S.C. Sections 717 *et seq.* (1982). INGAA's member pipeline companies, one of whom is KN, account for approximately 90 percent of all natural gas transported and sold in interstate commerce.

INGAA was granted intervention *amicus curiae* in the Colorado Supreme Court and filed a memorandum in support of KN's Petition for a Writ of Certiorari with that Court. This case raises important questions of concern to the interstate natural gas transmission industry regarding 1) the Commission's primary and exclusive jurisdiction relative to an interstate pipeline's service interruptions implemented under Commission certificates of public convenience and necessity, Commission orders, and/or the pipeline's tariffs on file with the Commission, and 2) whether, under the Supremacy Clause of the Constitution, the pipeline could nonetheless be held liable for such service interruptions under state contract law.

The Colorado Supreme Court declined to review the jurisdictional questions, and went on to hold that Commission certificates, orders and tariffs had no effect on KN's contract liability for service interruptions. That Court's decision could negatively affect the entire interstate gas pipeline industry. At stake is the potential liability of interstate pipelines under state contract law for Commission-sanctioned service interruptions that were implemented during a time of widespread gas shortages in the interstate market.

The Colorado courts' failure to recognize or defer to the Commission's primary and exclusive jurisdiction on these matters is inconsistent with the pronouncements of this

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[1] The term "Commission" when used in the context of action taken prior to October 1, 1977, refers to the Federal Power Commission; when used otherwise, the reference is to the Federal Energy Regulatory Commission.

Court in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). As a result, in its present form, this case is likely to lead to the types of inequities among states which this Court sought to prevent in *Louisiana Power & Light*. As the trade association representative of virtually all major interstate natural gas transmission systems that were subject to service interruptions and the Commission's curtailment program, INGAA is uniquely qualified to present the industry's position relative to this case and the adverse impact the Colorado Supreme Court's decision could have on the entire industry. Additionally, review by this Court is necessary to correct the Colorado courts' misapplication, or disregard, of unequivocal Supreme Court precedent.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari herein should be granted. If not vacated or reversed, the decisions of the Supreme Court of Colorado and lower state courts will stand as precedents undermining the primary and exclusive jurisdiction of the Commission over interruptions and curtailment of service by interstate natural gas pipelines. The state courts involved herein, before ruling on the contract claims before them, should have referred to the Commission a number of related questions involving pipeline compliance with the terms of service sanctioned by certificates, tariffs, orders, and rules of that Commission. Not to have so referred these questions to the Commission is contary to a number of decisions by this Court and other federal courts as well as the statutory scheme of the Natural Gas Act, and the pervasive regulation created by that Act. Moreover, it was also erroneous because the Supremacy Clause of the U.S. Constitution and the policies of the Natural Gas Act call for uniformity in the regulation of interstate gas pipelines. Without referral, these policies will be thwarted.

ARGUMENT

I. The Colorado Courts Erroneously Failed to Defer to the Commission's Primary and Exclusive Jurisdiction Over Interruptions in Service by Interstate Natural Gas Pipelines.

A. The doctrines of primary and exclusive jurisdiction are well established.

When an industry is comprehensively regulated, as is the interstate natural gas transmission industry, contractual disputes must be reviewed within the context of that regulation. By failing to invoke the Commission's exclusive jurisdiction and by refusing to refer to the Commission questions relative to KN's compliance with the Commission's certificates, orders and tariffs that resulted in the interruption of service, the Colorado Supreme Court erroneously treated the dispute as a simple breach of contract action, which it is not.

The concept of "primary jurisdiction" originated in a series of decisions of this Court beginning with *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). In that case, the Court held that, in litigation relating to rates regulated by the Interstate Commerce Commission (ICC), state and lower federal courts should not proceed without first giving the ICC an opportunity to address issues within its jurisdiction.[2] The doctrine does not withdraw a court's power to decide a case, but rather provides the appropriate regulatory agency an opportunity to initially determine legal or factual issues that are peculiarly within its competence. *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, 532 F.2d 412, 417 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977). There the court succinctly described the primary jurisdiction doctrine as a

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[2] See Travis, *Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act*, 63 Calif. L. Rev. 926 (1975), especially at 927-933.

means of reconciling the regulatory function of administrative agencies with the judicial functions of courts.

In some cases, a regulatory agency also has "exclusive jurisdiction" over an issue. While founded on principles of expert administrative competence, as primary jurisdiction, the doctrine of exclusive jurisdiction is considered to *require* a referral to the agency before the courts permit litigation to go forward. As stated by Professor Davis:

> An agency often has exclusive jurisdiction, which is something more than primary jurisdiction. Agencies typically have exclusive jurisdiction to resolve issues of fact, subject to limited review. The Supreme Court has spoken of "a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." *Far East Conference* v. *United States,* 342 U.S. 570, 574 (1952).[3]

The instant case is one where referral would not only be helpful to the Colorado Supreme Court, it is required. An interstate pipeline cannot engage in the interstate transportation of gas until it has obtained from the Commission a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act. When a certificate is accepted by the pipeline, the Commission acquires continuing jurisdiction over the services rendered and the operation of the facilities,[4] and the pipeline becomes bound

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[3] See 4 Davis, *Administrative Law Treatise,* Section 22:1 (1983). See also *FPC* v. *Louisiana Power and Light,* 406 U.S. at 647 and *J. M. Huber Corp.* v. *Denman,* 367 F.2d 104, 111-12 (5th Cir. 1966).

[4] See *Federal Power Commission* v. *Louisiana Power & Light Co.,* 406 U.S. at 645-646 (1972). See also *Atlanta Gas Light Co.* v. *Federal Power Commission,* 476 F.2d 142, 151 (5th Cir. 1973).

by any conditions attached to the certificate and by its own representations as to how it planned to provide the services authorized. The performance of services under a certificate creates a federal obligation independent of any private contract.[5] It is, therefore, the certificate which controls the terms of service, and the interpretation and enforcement of the pipeline's public service obligations under its certificate are therefore within the Commission's primary and exclusive jurisdiction.[6] Accordingly, the Colorado Supreme Court erred in not referring these matters to the Commission before ruling on the question of breach of contract. Such referral would not deprive the Colorado Supreme Court of its jurisdiction over the breach of contract action. It would simply assure that the Commission's determination as to the pipeline's service obligation was applied by the state court in resolving the claimed breach of contract.

B. The Commission's broad jurisdiction over interruptions in service has been repeatedly sustained by the Courts.

Respondent Great Western urges denial of KN's petition on the ground that it involves interruption rather than curtailment of gas service. (Great Western Brief in Opposition, pp. 11-13). This is a distinction without a legal difference. This Court held in *Panhandle Eastern Pipe Line*

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[5] See *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978) (service obligations resulting from certificates issued under the Natural Gas Act are not controlled by the terms of private contract).

[6] See Appendix hereto which contains pages 3-6 from the Brief *Amicus Curiae* of the Federal Energy Regulatory Commission filed with the Colorado Court of Appeals, June 26, 1980. See also *Gulf Oil Corporation* v. *Federal Power Commission*, 563 F.2d 588, 596-597 (3rd Cir. 1977), which related to the nature of Gulf's obligation to make deliveries of gas authorized by a certificate of public convenience and necessity previously issued by the FPC. There the court stated, ". . . this issue in the instant case is the interpretation of Gulf's public service obligation under its certificate, the interpretation of which can only be within the FPC's exclusive jurisdiction and which is not subject to arbitration. . . ."

Co. v. *Public Service Comm'n*, 332 U.S. 507, 516 (1947) that Congress drew "the transportation of natural gas in interstate commerce" within its regulatory power in enacting the Natural Gas Act. As to concerns about conflicting state and federal regulation "in relation to curtailment of service when weather conditions or others require it,"[7] the Court observed that "the matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commision to control, in accommodation of any conflicting interests among the states." (332 U.S. at 523).

Most interstate pipelines provide interruptible service. Such service may be interrupted for any one of several reasons, including a lack of pipeline capacity, the need to maintain pipline pressure, anticipated or actual weather changes, the need to husband gas in storage, a lack of gas supply in the field and the need to protect high priority customers from interruption. Commission jurisdiction does not depend upon the reason for interruption, nor is it activated by calling it a curtailment rather than an interruption. Jurisdiction depends upon the fact that transportation of natural gas in interstate commerce is interrupted. *Federal Power Commission* v. *Louisiana Power & Light Co., supra.* That jurisdiction is exercised by the Commission because the "adequacy and impartiality of service in the light of existing circumstances are within Commission control." *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 945 (6th Cir. 1949).

In *Federal Power Commission* v. *Louisiana Power & Light Co., supra,* this Court held that the Commission's jurisdiction over the transportation of natural gas in interstate commerce embraced regulation of a pipeline's system-wide interruptions in service to the exclusion of state regu-

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[7] "Curtailment" as here used by the Court refers to weather-related interruptions which KN imposed on its system.

lation. This Court went on to hold that the courts lacked jurisdiction to compel specific performance of a direct sale customer's contract by enjoining a pipeline's curtailments. This Court also held that the FPC had properly exercised its jurisdiction over curtailments through use of Order No. 431 (45 FPC 570 (1971)), and the procedures afforded by Section 4 of the Natural Gas Act.

Finally, this Court held that the Court of Appeals had erred in deciding whether a portion of the pipeline's system was subject to the FPC's jurisdiction. 406 U.S. at 647. The Court observed that the FPC was in the process of deciding this very issue, and that under the circumstances "the District Court and the Court of Appeals *were obliged to defer to the FPC for the initial determination of its jurisdiction.*" *Id.* (Emphasis supplied).[8]

Furthermore, in *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co., supra,* the U.S. Court of Appeals for the Fifth Circuit applied the *Louisiana Power & Light* decision by holding that the Commission had primary jurisdiction over a pipeline's potential contract liability for damages arising under the Commission's curtailment program. The Court of Appeals held that the Natural Gas Act had "provided the Commission with the statutory basis for pervasive regulation of the curtailment question" and that referral to the Commission for exericse of its primary jurisdiction was "particularly appropriate", if not mandatory, with respect to some issues. (532 F.2d at 419). In particular, the Fifth Circuit noted that the Commission's "informed opinion" on whether the pipeline's tariff pro-

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[8] At the time of the Colorado Supreme Court's decision, the Commission had instituted a proceeding into the effect, if any, of its orders and/or KN's certificates and tariffs upon KN's alleged contract liability to Great Western for interruptions in service. That proceeding is currently pending at the Commission. *KN Energy, Inc.*, 21 FERC (CCH) ¶61,285 (Dec. 7, 1982).

vided it with any defense to the damage claims would be critical to resolution of those claims:

> Certainly the interpretation and implementation of a tariff is a question properly passed upon in the first instance by the Commission, and reference by a court to a regulatory agency may not even be discretionary on such an issue. *Interstate Commerce Commission* v. *Atlantic C.L.R. Co.*, 383 U.S. 576, 600-601, 86 S.Ct. 1000, 1014-1015, 16 L.Ed.2d 109, 126 (1966); *United States* v. *Western P.R. Co.*, 352 U.S. 59. . . .

532 F2d at 420.

Subsequent to the *Mississippi Power & Light* decision, a number of federal courts in which breach of contract suits for curtailments had been brought referred issues to the Commission for exercise of its jurisdiction and stayed trial in the interim.[9] The Commission accepted some of the referred issues, incorporated them into an ongoing proceeding dealing with the pipeline's potential contract liability for curtailments, and is currently reviewing an administrative law judge's initial decision in that case.[10]

In the only curtailment damage suit in which a federal court refused to refer issues to the Commission for exercise of its primary jurisdiction, the Court of Appeals itself

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[9] *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, No. J74-185(N) (S.D. Miss. April 22, 1977); *Mississippi Power Co.* v. *United Gas Pipe Line Co.*, No. S74-285(C) (S.D. Miss. June 14, 1977); *Allied Paper Inc.* v. *United Gas Pipe Line Co.*, No. 75-431(H) (S.D. Ala. Jan. 19, 1977); *Texasgulf Inc.* v. *United Gas Pipe Line Co.*, 471 F.Supp. 594 (D.D.C. 1979). One of the district courts vacated the stay after it had been in effect for several years and proceeded to trial. *Texasgulf Inc.* v. *United Gas Pipe Line Co.*, No. 2253-71 (D.D.C. Oct. 26, 1984). That case has not yet been decided.

[10] The referral issues accepted by the Commission are reported at 4 FERC (CCH) ¶61,151 (1978). The administrative law judge's initial decision is reported at 20 FERC (CCH) ¶63,070 (1982).

referred issues and stayed the appeal of a damage judgment against the pipeline during the interim.[11] The U.S. Court of appeals for the Fourth Circuit there stated "that deference to the primary jurisdiction of the Commission is particularly appropriate in the complex area of natural gas curtailment."[12]

II. The Need To Effectuate The Objectives Of The Natural Gas Act In A Uniform And Equitable Manner Require Reversal Of The Decisions Below.

The federal courts that have considered the Commission's jurisdiction over curtailment-related damage claims have concluded that the needs to assure uniform regulatory treatment of pipelines and to avoid unwarranted state interference in carrying out the Natural Gas Act's mandate overwhelmingly support the Commission's primary and exclusive jurisdiction.[13] Those needs are present in this case as

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[11] *C.F. Industries* v. *Transcontinental Gas Pipeline Corp.*, 614 F.2d 33 (4th Cir. 1980).

[12] 614 F.2d at 35. The Court of Appeals asked the Commission to determine the meaning and interpretation of the pipeline's gas tariff provisions and service agreements and of the Commission's orders, rules and regulations relating to curtailments upon the pipeline's alleged contract liability for curtailments. The Commission accepted some of these and other referred issues, and incorporated them into an ongoing proceeding. 13 FERC (CCH) ¶ 61,147 (Nov. 19, 1980). The Commission is now reviewing an administrative law judge's initial decision in the case.

[13] *C. F. Industries, Inc.* v. *Transcontinental Gas Pipeline Corp., supra; Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976); *Texasgulf, Inc.* v. *United Gas Pipe Line Co., supra.* Cf. *Chicago and N. W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) wherein this Court, in speaking of the authority of the ICC, observed that:

> The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines *is critical to the congressional scheme which contemplates comprehensive administrative regulation of interstate commerce.* 450 U.S. at 321 (Emphasis supplied). See also, *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588 (3rd Cir. 1977) and *FERC* v. *Shell Oil Co.*, 566 F.2d 536 (5th Cir. 1978), *aff'd*, 440 U.S. 192 (1979).

well. Only by permitting the Commission to exercise its jurisdiction before the state courts render judgment can there be harmony in this case between the state and federal interests and between the respective jurisdictions of the courts and the Commission. Moreover, the failure to refer these questions of certificates and tariffs to the Commission could place pipelines in the untenable position that their compliance with federal service obligations could subject them simultaneously to liability under state law for breach of contract.

The grant of a writ of certiorari would permit this Court to review the Colorado Court of Appeals' conclusion, which the Supreme Court of Colorado declined to review, that, notwithstanding the foregoing, the doctrines of primary and exclusive jurisdiction are inapplicable to this case. The conclusion was premised upon the Court of Appeals' reasoning that:

> [t]he issues presented here involve common law contract claims. The fact that the Natural Gas Act and applicable tariffs affect some of the dealings between the parties *does not oust state courts* of jurisdiction over these common law claims. . . .[14] (Emphasis added).

There are two deficiencies in this reasoning. First, while the plaintiff has *asserted* "common law contract claims," the issues involve, *inter alia,* the effect on these claims of Commission orders, rules, and regulations and KN's tariff.[15]

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[14] Slip opinion, page 9.

[15] The existence of a federal interest in this proceeding is evidenced by (a) the Commission's repeated requests to the Colorado courts to refer issues for exercise of its primary and exclusive jurisdiction, (b) the Commission's institution of a special proceeding to determine how its orders and KN's certificates and tariffs affect KN's alleged contract liability to Great Western, and (c) the denial by the Commission of Great Western's motion to dismiss KN's motion for a declaratory order. See *KN Energy, Inc.*, 21 FERC (CCH) ¶ 61,285 (Dec. 7, 1982), petition for review dismissed, *Great Western Sugar Co.* v. *FERC*, No. 83-1135 (D.C. Cir., April 16, 1984).

Second, KN has not contended that the presence of these orders and tariff provisions "oust" the state courts of jurisdiction over the common law claims.[16] Rather, the contention is that, in a case involving the interpretation and effect of Commission orders and a pipeline's tariffs upon the common law claims, where the Commission asserts the right to make these interpretations initially in order to ensure the uniformity and integrity of its regulation, the doctrines of primary and exclusive jurisdiction require a referral of issues to the Commission.[17] The appropriateness of referral is demonstated further, by the proceeding underway at the Commission prior to the time of the Colorado Supreme Court's decision, which proceeding is still pending.[18]

In declining to refer, the Colorado Court of Appeals placed reliance on *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1978). However, in *Nader,* this Court distinguished the *Abilene* case, *supra.* Unlike *Abilene,* in *Nader* there was no irreconcilable conflict between the statutory scheme and the persistence of common law remedies. The *Nader* Court said that "[i]n *Abilene* the carrier, if subject to both agency and court sanctions, would be put in an untenable position when the agency and a court disagreed on the reasonableness of a rate. . . ." (*Id.* at 299). If the Colorado Court of Appeals' decision, affirmed by the Supreme Court of Colorado, is allowed to stand, KN would find itself in a comparably untenable position.

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[16] See Kansas-Nebraska's Petition for Rehearing, p. 8. Consequently, the case principally relied upon by the Court of Appeals for its failure to apply the primary jurisdiction doctrine, *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961), is inapposite. That case involved removal jurisdiction, *i.e.,* whether the case arose under federal law and hence lay within the exclusive jurisdiction of the federal courts.

[17] The doctrine does not ask courts to give the agency the last word—only the first. *Marine Engineers Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U.S. 173, 185 (1962).

[18] See Note 8, *supra.*

Additionally, in such circumstances, serious constitutional issues would be raised under the Supremacy Clause of the United States Constitution. In *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571 (1981), this Court held that a state court's award of damages for breach of contract was inconsistent with the pipeline's filed tariff prescribing the rate and that the damage award could not stand under the Supremacy Clause. In *Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co., supra,* this Court held that a state court's award of damages for a rail carrier's failure to furnish freight cars on a branch line likewise had to be set aside because it was preempted under federal law. The Court, quoting *Missouri Pacific R. Co.* v. *Stroud,* 267 U.S. 404, 408 (1925), observed that "[t]here can be no divided authority over interstate commerce and the acts of Congress on that subject are supreme and exclusive," 450 U.S. at 319. This Court also commented that "A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act. . . ." *Id.* at 326.[19] In the area of natural gas curtailments, this Court has observed, "the desirability of uniform federal regulation is abundantly clear." *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. at 635. Indeed, such uniformity serves both federal and state interests, since it eliminates the possibility of discrimination in favor of a pipeline's customers in one state against customers in another state when curtailments are necessitated.

While paying lip service to the Commission's right to approve curtailment plans which may supersede private contractual provisions,[20] the Colorado courts usurped that

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[19] For another recent natural gas case in which the Supremacy Clause was invoked to overrule state action, see the majority opinion (by Justice White) in *Maryland* v. *Louisiana,* 451 U.S. 725, 753-60 (1981).

[20] See Appendix A to KN's Petition, p. 19a.

very power. As in *Kalo Brick & Tile, supra,* "[t]he decision below amounts to a holding that a State can impose sanctions upon a regulated carrier for doing that which only the Commission, acting pursuant to the will of Congress, has the power to declare unlawful or unreasonable." 450 U.S. at 324.

This is so because the Colorado decision has the effect of holding Great Western exempt from the federal orders, certificates or tariffs that apply to the type of interruptions in service complained of by Great Western.

This Court recognized in *Louisiana Power & Light* that exemptions from curtailment programs could produce a seriously inequitable system of gas distribution vis-à-vis customers such as schools, hospitals and homes. 406 U.S. at 632. The record in this case reveals no consideration of the impact upon such customers caused by exempting Great Western. The Colorado courts have thus ignored this Court's admonition that there should "be no 'gaps' for private interests to subvert the public welfare." *Id.* at 631.[21] In short, it is important for the Court to review this case both to protect the Commission's exclusive jurisdiction over curtailment programs and also to ensure that conflicting state court decisions do not "produce a seriously inequitable system of gas distribution" between the states. *Louisiana Power & Light,* 406 U.S. at 632.

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[21] In its *Amicus* brief filed in the Colorado trial court, the Commission indicated that it would consider these important public policies. For instance, it stated that:

> [d]eferral to the Commission is particularly appropriate in this case, because the issues which this damage action invokes are highly complex and have an impact on the public interest which transcends the private litigation before this Court. There is a substantial possibility, absent reference to the Commission, of a conflict between the decisions of this Court and the Commission. Such conflict could affect the Commission's ability to regulate reductions in natural gas service in a uniform manner.

KN's petition, p. 9, n.11.

III. The Colorado Supreme Court's Interpretation Of KN's Tariff Filings Is In Error.

The need for referral of this proceeding to the FERC is further demonstrated by the holding of the Colorado Supreme Court that, even if KN's tariffs (a) were filed in response to Commission Order No. 431 and subsequent Commission orders pertaining to curtailments and (b) were placed into effect pursuant to Section 4 of the Natural Gas Act, such tariff filings were unilateral actions under *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and as such, could only affect KN's contract liability upon a Commission finding that the tariff filings were just and reasonable.[22] These holdings of the Colorado Supreme Court overlook *Louisiana Power & Light, supra,* wherein this Court held that a pipeline's tariff filings in response to Commission curtailment orders were *not* unilateral actions and hence were expressly distinguishable from the situation in *Mobile:*

> *Amici* have argued that permitting the pipeline's tariff amendments to take effect despite contrary terms in existing contracts is inconsistent with any decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). In that case, however, we dealt with an attempt by a pipeline *unilaterally* to effect a change in its contract terms by making a filing under Section 4. In the present cause, the issue is whether FPC, acting under the head of its transportation jurisdiction and its broad mandate under Section 16, may order pipelines facing shortages to develop and submit rational curtailment arrangements. Our holding in *Mobile Gas Service Corp.* does not govern the decision of this issue. . . .

406 U.S. at 646. This Court went on to state that under Order No. 431, one of the orders relied upon by KN "[a]ll pipelines facing shortages necessitating curtailment are *required* to file reasonable allocation schemes as amendments

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[22] Appendix A to KN's petition, pp. 22-24.

to their existing tariffs, or to state that the existing tariffs are adequate." 406 U.S. at 645 (Emphasis added). In light of the foregoing, it is manifestly clear that the FPC's orders and KN tariffs, if they authorize the interruptions to Great Western complained of, govern any inconsistent obligations because of the supremacy of federal laws.[23] As has been noted, strong judicial precedent calls upon the courts below to defer to the FERC for initial determinations as to the precise meaning and application to this case of the orders and tariffs in question. Accordingly, the Colorado courts erred in not referring the matter to the FERC.

CONCLUSION

The grant of a writ of certiorari is warranted so that this Court can review the actions of the Colorado Supreme Court and the lower courts thereunder (a) in refusing to refer to the FERC issues pertaining to the construction and application of pertinent Commission orders, rules, regulations and tariff provisions and (b) in proceeding to construe these orders, rules, and tariff provisions as having no effect upon KN's alleged contract liability.

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[23] See *Fidelity Federal Savings & Loan Assoc.* v. *de la Cuesta*, 458 U.S. 141 (1982); *Carter* v. *American Telephone Co.*, 365 F.2d 486 (5th Cir. 1966); *International Paper Co.* v. *FPC*, 476 F.2d 121, 131 (concurring opinion). See also *Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.*, *supra*.

Respectfully submitted,

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APPENDIX

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Before a natural gas company may engage in the transportation of gas subject to the Commission's jurisdiction, or build or extend any facilities therefor, the company must obtain a certificate of public convenience and necessity, issued by the Commission under Section 7(c) of the Act, authorizing such acts or operations.[3]

When a certificate is issued by the Commission and accepted by the company, the Commission acquires a continuing jurisdiction over the services rendered thereunder and the operation of the certificated facilities.[4] The company may not thereafter abandon all or any portion of these facilities or any service rendered by these facilities,

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[3] Section 7(c) provides in pertinent part:

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [15 U.S.C. § 717f(c)]

[4] Hence, courts do not have jurisdiction to order specific performance of a contractual obligation to deliver natural gas, where such delivery is under FERC's jurisdiction. *Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142, 151 (5th Cir. 1973).

without the Commission's permission obtained upon requisite findings.[5]

A pipeline company applying to the Commission for a Section 7(c) certificate to serve a customer submits a contract, entered into by the company and the intended customer, setting forth the terms and charges for the proposed service. The contract alone cannot start gas flowing to the customer, however. It requires a certificate to authorize commencement of the proposed service.

Section 7(e) of the Act requires that any proposed service, sale, operation, construction, extension or acquisition must be required by the present or future public convenience and necessity. To this end, Section 7(e) gives the Commission the power to attach to the certificate such reasonable terms and conditions as the public convenience and necessity may require.[6]

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[5] Section 7(b) provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [15 U.S.C. § 717f(b)]

[6] Section 7(e) provides:

> Except in the cases governed by the provisions contained in subsection (e)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the

In accepting a certificate, the pipeline company becomes bound by any conditions and interpretations which the Commission has attached thereto. *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 156 (1959); *Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U.S. 378, 389 (1959). The service which a natural gas company performs under a certificate is distinct from the contract which regulates the company's relationship with its customer. *Sunray Oil Co., supra*, 364 U.S. at 137, 152-53. A certificate creates a federal obligation to provide the relevant service until the Commission permits its cessation. Under the statute the obligation to continue service attaches to the gas, not as a matter of contract but as a matter of law, and binds all those with dominion over the gas. *California* v. *Southland Royalty Co.*, 436 U.S. 519, 526 (1978). It is therefore the certificate, not the contract, which controls the terms of the service, and the interpretation and enforcement of the company's public service obligation under its certificate is within the Commission's exclusive jurisdiction.[7] 436 U.S. 519, 526-27; *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 596-97 (3rd Cir. 1977).

Were the Commission to find that a natural gas company had violated the terms of its certificate by failing to deliver the amount of gas to which a customer was en-

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[6] [Footnote continued from previous page]

present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. § 717f (e)]

[7] The Commission has not already acted by defining the key contract term—the word "interruptible"—involved in this lawsuit. Indeed, its exact definition is a major subject of the proceedings in Docket No. RP76-90 (Phase II).

titled, the Commission has the power to require two types of remedy. It could order the company to pay a monetary refund, generally in the amount of the incremental cost that the customer incurred for alternate fuel supplies. *Mesa Petroleum Co.* v. *FPC,* 441 F.2d 182, 186-89 (5th Cir. 1971); *Gulf Oil Corp.* v. *FPC, supra,* 563 F.2d 588, 605-08. Or it could direct the company to pay back the customer with gas. *Cox* v. *FERC,* 581 F.2d 449 (5th Cir. 1978).

The certificated services to a pipeline's customers, direct sale or resale, are implemented by the pipeline's tariff. Every interstate pipeline files with the Commission a tariff containing the rates it charges its wholesale customers and the general terms and conditions of the service it provides to all its customers. The interpretation and implementation of tariff terms are within the Commission's primary jurisdiction. *United States* v. *Western Pacific R. Co.,* 352 U.S. 59, 63 (1956); *Mississippi Power & Light Company* v. *United Gas Pipe Line Company,* 532 F.2d 412, 420 (1976).